STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED September 26, 2006
v	No. 261162 Tuscola Circuit Court
RONALD CLARENCE BABCOCK, Defendant-Appellant.	LC No. 03-008846-FH

Before: Davis, P.J., and Murphy and Schuette, JJ.

PER CURIAM.

Defendant appeals as of right his jury trial convictions of one count of felon in possession of a firearm, MCL 750.224f, and one count of possession of a firearm during the commission of a felony (felony-firearm), MCL 750.227b. Defendant was sentenced to serve a prison term of 46 months to 360 months for the felon in possession of a firearm conviction and a consecutive two years for the felony-firearm conviction. We affirm.

Defendant is a convicted felon. He was ineligible to possess a firearm at all times relevant to this case. Defendant's former girlfriend, Shawn Lester, testified that while they were still dating, defendant selected a .22 rifle from Wal-Mart and gave her money with instructions to purchase it for him. She purchased the gun and some ammunition and took it to her home, where defendant took the gun and demonstrated to her how to load it. She insisted that defendant not remove the gun from her home because she knew he was a felon and ineligible to possess it, but he nevertheless took it and the ammunition out with him the next day. Cindy Pero, the sister of one of defendant's friends testified that defendant took the gun to her house because he and his friend were going to shoot skeet with it. Lester later retrieved the gun from Pero's house after reporting the matter to a police officer. Lester took the gun to Stella Sherman, who placed it in her husband's gun safe. Lester admitted that this was some time after she and defendant had broken up. State Police Officer Hilary Hare retrieved the gun from Sherman's house and later interviewed defendant at jail.

Subsequent to his arrest, but prior to trial, Hare informed the prosecutor that she would be unavailable to testify at trial because she would be on her honeymoon See MRE 804(b)(5)(A). The prosecutor sought to adjourn the trial. In lieu of an adjournment, the trial court ordered that the officer's video deposition be taken. Defendant objected, but was present at and cross-examined the officer during the deposition. At the deposition, Hare testified, among other things, that defendant admitted to her at the jail interview that he had had Lester purchase a .22

rifle, which he later removed from Lester's residence and took to Pero's residence. An edited[1] transcript of the deposition was read before the jury, again over defendant's objection. The videotape itself was not played for the jury, although the record is unclear whether some portion of it may have been played.

Defendant argues that reading Hare's testimony in lieu of requiring her live testimony violated his right of confrontation under the Sixth Amendment to the United States Constitution. We agree. Generally, we review evidentiary rulings for an abuse of discretion. *People v Hine*, 467 Mich 242, 250; 650 NW2d 659 (2002). However, because defendant's challenge to the court's ruling invokes his confrontation right, our review is de novo. See *People v Beasley*, 239 Mich App 548, 557; 609 NW2d 581 (2000).

The Sixth Amendment to the United States Constitution guarantees an accused the right "to be confronted with the witnesses against him." US Const, Am VI. Testimonial evidence of an absent declarant may nevertheless be admitted in a criminal prosecution given certain circumstances. Such evidence is only admissible if the declarant is unavailable and the accused has enjoyed a prior opportunity to cross-examine the witness. *Crawford v Washington*, 541 US 36, 68; 124 S Ct 1354; 158 L Ed 2d 177 (2004). Under MRE 804(a)(5), a witness is "unavailable" if the witness is absent from the hearing and the prosecution has made a "diligent good-faith effort" to procure the witness. *People v Bean*, 457 Mich 677, 683-684; 580 NW2d 390 (1998). "The test is one of reasonableness and depends on the facts and circumstances of each case." *Id*., 684. Likewise, a declarant is not constitutionally "unavailable" unless "the prosecutorial authorities have made a good-faith effort to obtain his presence at trial." *Barber v Page*, 390 US 719, 724-725; 88 S Ct 1318; 20 L Ed 2d 255 (1968). The effort constitutionally required of the prosecution is again a matter of reasonableness, which depends on good faith and whether "affirmative measures might produce the declarant." *Ohio v Roberts*, 448 US 65, 74-75; 100 S Ct 2531; 65 L Ed 2d 597 (1980), overruled on other grounds in *Crawford*, *supra* at 36.

We have explained that the constitutional right to confront one's accusers:

> consists of four separate requirements: (1) a face-to-face meeting of the defendant and the witnesses against him at trial; (2) the witnesses should be competent to testify and their testimony is to be given under oath or affirmation, thereby impressing upon them the seriousness of the matter; (3) the witnesses are subject to cross-examination; and (4) the trier of fact is afforded the opportunity to observe the witnesses' demeanor. [*People v Pesquera*, 244 Mich App 305, 309; 625 NW2d 407 (2001), citing *Maryland v Craig*, 497 US 836, 846, 851; 110 S Ct 3157; 111 L Ed 2d 666 (1990).]

This right may not "easily be dispensed with," but it is not absolute and must "be interpreted in the context of the necessities of trial and the adversary process." *Craig*, *supra* at 850. Therefore, this right "'must occasionally give way to considerations of public policy and the necessities of the case.'" *Pesquera*, *supra* at 309-310, quoting *Mattox v United States*, 156 US 237, 243; 15 S

[1] The parties excluded some portions of Hare's testimony.

Ct 337; 39 L Ed 409 (1895). It is not disputed here that the videotape deposition was given under oath and subject to cross-examination. However, the jury could not observe the witness' demeanor given that the videotape itself was not played for them, and the core importance of face-to-face confrontation precludes dispensing with it with unless the trial court finds doing so "necessary." *Pesquera*, *supra* at 310.

We agree with the Sixth Circuit's holding that, in the abstract, a videotaped deposition is not a substitute for live testimony under the Confrontation Clause. "The jury may be able to gauge the witness's demeanor, second-hand, on a television monitor, but the witness is not forced 'to stand face to face with the jury.'" *Brumley v Wingard*, 269 F3d 629, 642 (CA 6, 2001). The jury here did not even have the opportunity to observe the witness' demeanor. Clearly, defendant's rights to meet his accuser face-to-face and to have the jury observe the witness, even second-hand, were denied him here. Although this is not by itself *necessarily* an error, let alone an error warranting reversal, the central question is whether dispensing with these rights was "necessary."

We conclude that it was not. This was not a situation where "the witness is or will be psychologically or emotionally unable to testify," MCL 600.2163a, such as a child sexual assault victim testifying as a witness. See *Pesquera*, *supra*. Although Michigan has apparently not explicitly addressed whether a witness is "unavailable" because she is on a vacation out of the state, we now agree with the Sixth Circuit and several of our sister states that neither fact necessarily makes a witness unavailable. *Brumley*, *supra*; *Garner v Indiana*, 777 NE2d 721, 725 (Ind, 2002); *Barnes v Alabama*, 704 So 2d 487, 496 (Ala Crim App, 1997) (concluding that a declarant's vacation did not constitute constitutional unavailability); *Tennessee v Henderson*, 554 SW2d 117, 118, 121 (Tenn, 1977); *Washington v Sanchez*, 42 Wash App 225; 711 P2d 1029 (1985).

Officer Hare was not constitutionally unavailable. Had the prosecutor subpoenaed her, she would have been obligated to appear. Her whereabouts were known. She was scheduled to be on vacation approximately 11 days, a length of time unlikely to "grind the wheels of justice to a halt." *Garner*, *supra* at 725. It was entirely possible to require the officer's attendance at trial. *Roberts*, *supra* at 74-75. A vacation does not constitute constitutional unavailability where the declarant may be located and procured. *Garner*, *supra* at 725; *Barnes*, *supra* at 496; *Henderson*, *supra* at 118, 121; *Sanchez*, *supra* at 225. In rejecting the prosecution's request for an adjournment, the court considered the convenience of a third party. Cf. *Garner*, *supra* at 725. Defendant's right to force the officer "to stand face to face with the jury" was violated. *Brumley*, *supra* at 642. Officer Hare's presence could have been obtained by subpoena or by adjournment.

Notwithstanding the violation of defendant's confrontation right, his conviction need not be overturned if the foregoing error was harmless. "Harmless error analysis applies to claims concerning Confrontation Clause errors." *People v Shepherd*, 472 Mich 343, 348; 697 NW2d 144 (2005). We "'conduct a thorough examination of the record' in order to evaluate whether it is clear, beyond a reasonable doubt, that the jury verdict would have been the same absent the error." *Id.* (citation omitted). "[W]here the error is of constitutional dimension, the burden of demonstrating its harmlessness rests with the prosecutor." *People v Minor*, 213 Mich App 682, 685; 541 NW2d 576 (1995). The prosecutor "must demonstrate on appeal that 'there is no "'reasonable possibility that the evidence complained of might have contributed to the

conviction.'"'" *People v Smith*, 249 Mich App 728, 730; 643 NW2d 607 (2002) (citations omitted). That is, that the error had no effect on the verdict. *Minor, supra* at 685.

Under the circumstances of this case, we find the error was harmless. The prosecution offered substantial evidence of defendant's guilt. Two witnesses testified that they personally observed defendant in possession of the firearm. The parties stipulated that defendant was a felon and ineligible to possess a firearm. This evidence alone would be sufficient to conclude that the verdict was unaffected by Officer Hare's testimony, particularly given that she did not personally witness defendant in possession of the rifle. Defendant notes that during its deliberations, the jury sent a note asking: "Did . . . [defendant] admit to taking the gun from the house? (to the officer)." The court responded affirmatively.[2] We decline to infer from this note that the jury found the rest of the testimony unconvincing. We note also that part of defendant's theory at trial was that Lester said inconsistent things to Hare regarding Lester's relationship with defendant and the circumstances under which she purchased the gun. Any theoretical doubt in the jurors' minds suggested by their note could well have been placed there by Hare's testimony in the first place. When the trial is viewed as a whole, we see no "reasonable probability" that the officer's testimony, on balance, contributed to defendant's conviction. *Smith, supra* at 730. Although it was error for the trial court to admit Hare's testimony in this manner, her testimony was sufficiently redundant that we do not believe defendant suffered any prejudice as a result.

Defendant next contends that the trial court improperly instructed the jury on the definition of "possession" when the jury sent another note asking for one. We disagree. The trial court provided the jury with a modified version of the narcotics possession definition found in CJI2d 12.7, which is actually a narrower definition than the firearm possession definition provided by our Supreme Court in *People v Burgenmeyer*, 461 Mich 431, 436-439; 606 NW2d 645 (2000). The trial court omitted any discussion of constructive possession, which would have been permitted by *Burgenmeyer*. However, constructive possession was not relevant given that the testimony focused on defendant's actual possession of the gun, and we do not see that defendant was prejudiced by an instruction holding the prosecution to a higher standard of proof against him than necessary. The trial court's instruction was "appropriate." MCR 6.414(H).

Defendant next contends that the trial court impermissibly ordered him to reimburse Tuscola County for costs of his court-appointed attorneys. We agree in part. Trial courts may order criminal defendants to reimburse such expenses. *People v Nowicki*, 213 Mich App 383, 387-388; 539 NW2d 590 (1995). The trial court must, however, consider a number of factors, including defendant's ability to pay. *People v Dunbar*, 264 Mich App 240, 251-254; 690 NW2d 476 (2004). The trial court properly did so here. However, the trial court ordered a 20 percent

[2] The trial court's response to the jury outside the presence of the parties was procedurally improper. MCR 6.414(B). However, the testimony was straightforward and the trial court's response did not distort, embellish, amplify, or otherwise misrepresent the evidence that had already been presented to the jury. Although the better practice would have been to ensure that the parties were present, we do not find an abuse of discretion under the circumstances of this case.

late penalty despite acknowledging defendant's indigency. We agree with defendant that this functionally constitutes an impermissible order making the repayment obligation immediate, rather than tracking defendant's solvency. It appears that the order simply fails to reflect the trial court's proper findings, so we vacate the reimbursement order and remand this portion of the judgment of sentence for entry of a corrected order consistent with the court's findings.

Defendant also argues that the trial court improperly ordered him to pay court costs. We disagree. The trial court did not impose any costs in this case, but rather decided to consolidate the fees, costs, and fines defendant had previously incurred in prior cases into a single judgment. Therefore, because there was no actual imposition of costs, there cannot be any prejudicial error. Defendant argues that the trial court's order consolidating the amounts owing from his prior convictions was itself erroneous, but defendant failed to object below, and because the order constituted no more than an administrative reshuffling of already-existing obligations, we still fail to perceive how defendant was prejudiced thereby.

Defendant next argues that the trial court improperly imposed victim's rights fees, restitution, and state minimum costs. We disagree. The trial court imposed $60 in crime victim's rights fees, which is proper under MCL 780.905. Defendant contends that the trial court impermissibly imposed additional crime victim's rights fines, MCL 780.905(2), but in fact the trial court merely consolidated previous fines, as discussed. The trial court also did not order restitution in this case, but again merely consolidated previous obligations. The trial court imposed $120 in state minimum costs at $60 for each felony conviction. This is also proper under MCL 760.1j(1)(a), which contains no limitation on the number of assessments like the crime victim's rights fees statute. We find no error in the assessments actually made in this case, and as noted we find no prejudice arising out of the trial court's consolidations.

Defendant argues that he was entitled to jail credit time for time served during the pendency of these proceedings. We disagree. Defendant was on parole from a prior conviction at the time he was arrested for the offenses in this case. He was held on a parole detainer during the pendency of these proceedings. Therefore, the time defendant spent in jail is applied only to the prior sentence, which he was continuing to serve. He is not entitled to credit for the instant offense. See *People v Sneiders*, 262 Mich App 702, 705-706; 686 NW2d 821 (2004); *People v Brown*, 186 Mich App 350, 359; 463 NW2d 491 (1990). Nor is defendant statutorily entitled to credit under MCL 769.11b, *People v Stead*, 270 Mich App 550, 551-552; 716 NW2d 324 (2006), or due process or equal protection. *People v Stewart*, 203 Mich App 432, 433-434; 513 NW2d 147 (1994).

Defendant finally contends that his convictions for felon in possession of a firearm and for felony-firearm violate his rights to equal protection, due process, and freedom from double jeopardy. We disagree. This Court and our Supreme Court have both explicitly rejected defendant's double jeopardy argument. *People v Calloway*, 469 Mich 448, 452; 671 NW2d 733 (2003); *People v Dillard*, 246 Mich App 163, 168-171; 631 NW2d 755 (2001). Defendant's equal protection and due process claims are both premised on allegations of arbitrary and discriminatory classifications. Felons are not among the list of suspect or quasi-suspect classifications. *Hatcher v State Farm Mut Automobile Ins Co*, 269 Mich App 596, 602-603; 712 NW2d 744 (2005). There is no fundamental right to possess a firearm after being convicted of a felony. *People v Swint*, 225 Mich App 353, 362-363; 572 NW2d 666 (1997).

Defendant primarily contends that the felony-firearm statute, MCL 750.227b, invidiously excepts the crime of unlawful possession of a firearm by a licensee, MCL 750.227a, but does not except possession of a firearm by a felon, MCL 750.227b. Defendant argues that this discriminates against felons. Because no suspect classification and no fundamental right is involved, defendant must show that the classification is so arbitrary that no set of facts could reasonably justify it. *People v Cooper*, 220 Mich App 368, 372-373; 559 NW2d 90 (1996). Defendant cannot do so here. "The Legislature has made the determination that felons, who have exhibited their disregard for ordered society and pose a threat to public safety, and firearms are a lethal combination," and has therefore enacted legislation to keep "guns out of the hands of those most likely to use them against the public." *Swint*, *supra* at 374. We see nothing arbitrary or capricious in the Legislature's further conclusion that those who are actually licensed to possess firearms, but who exceed the scope of that license, are less dangerous and therefore in need of fewer penalties. Defendant's constitutional rights have not been infringed.

The reimbursement order is vacated and remanded for entry of a corrected order. Affirmed in all other respects. We do not retain jurisdiction.

/s/ Alton T. Davis
/s/ William B. Murphy
/s/ Bill Schuette